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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 59

NORTHERN PACIFIC RAILWAY COMPANY and
NORTHWESTERN IMPROVEMENT COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

REPLY BRIEF FOR APPELLANTS

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The brief for the United States in this case argues that appellants' traffic clauses foreclose competitors from "the substantial market represented by shippers who have leased or purchased appellants' lands" because they "deny competing sellers of transportation equal access to the market on the same terms as appellant" (Br. p. 21). The claim is that in *International Salt Co. v. United States*, 332 U. S. 392,

this Court held a like provision exclusionary. In order to satisfy the requirement that "market dominance" over the "tying" product must also appear, the Government argues that land is inherently unique, and, because no two parcels are exactly alike, each parcel constitutes the whole of a relevant market, so that the owner is a monopolist with respect to the market for his land. It seeks to bolster this argument by contending that in *International Salt* it was the uniqueness of the patented article and not the patent monopoly which made it unnecessary to consider the availability of substitutes.

Our answer to these contentions follows.

1. Appellants' Traffic Clauses Do Not Exclude Competitors From the Market.

As pointed out in our opening brief, appellants' traffic clauses do not require lessees or purchasers to use Northern Pacific services at all events, but only when the destination can be reached via its lines and its rates and service are equal to those of competitors. They differ from the "Lixator" contracts considered in *International Salt*, in that they do not require the lessee to give Northern Pacific an opportunity to meet the rate of a competitor before being free to use the services of the competitor, as did the Lixator contracts, but require Northern Pacific to keep its rates and service competitive at all times if it is to get the business of its lessees and purchasers. Since Northern Pacific's rates must be published in its tariffs, and open to all shippers of the same commodity between the same points and subject to change only on 30 days' notice, appellants' traffic clauses cannot be presumed to have any stifling effect on competition. Rates of competing carriers are not always the

same between the same points. Transit privileges, stops to complete loading or to partially unload, or other special privileges which affect the measure of the rate, may be available via one line and not via another. Common carrier motor truck lines publish different rates than railroads, and contract truckers and exempt truckers notoriously compete for business on special or secret rates. And, as is well known, the controlling competition affecting the measure of rail rates is often the competition of rates to common markets from other producing sections, rather than competition for the business of the same shippers.

The Sherman Act is concerned with the advantages which accrue to the public from free competition in the market, and we do not uderstand that it is concerned with the share of the business any competitor may obtain. In consequence, it is difficult to understand why it should be supposed that competition will necessarily be injured to the detriment of the public, unless competing sellers of transportation are guaranteed the opportunity to secure a share of the business of occupants of appellants' lands without offering better rates or better service than Northern Pacific offers.

As we read the opinion in the *International Salt case*, the "Lixator" contracts were condemned, not on the ground that they foreclosed competitors from any substantial market, but on the ground that they tended to monopoly and hence violated Section 3 of the Clayton Act. The "Saltomat" contracts required exclusive use of International's salt at all events and plainly did foreclose competitors from the markets for salt preempted by those machines. What the Court said respecting the unreasonableness *per se* of foreclosing competitors from any substantial market was thus clearly applicable to the Saltomat contracts. But its holding with

respect to the "Lixator" contracts was only that the proviso did not avoid "the stifling effect of the agreement on competition" or relieve it of being a restraint of trade, "albeit a less harsh one than would result in the absence of such a provision." If the Court had considered that the "Lixator" contracts also foreclosed competitors from a substantial market, there was no need for its statements (p. 396) concerning "the tendency of the arrangement to accomplishment of monopoly." But the patent monopoly held by the International Salt Company on the manufacture and sale or lease of its salt machines made the tendency of the "Lixator" contracts to accomplishment of monopoly obvious, for the priority it obtained on the sale of salt for use in such machines would necessarily expand as patronage of its salt machines increased; and there was no limit to the number of such machines it could exclusively produce.

The situation in respect of appellants' lands is wholly different. Their ownership has no potential for expansion; on the contrary it is dwindling. It gives them no power over or exclusive right to other lands. Any priority Northern Pacific may obtain upon the business of lessees and purchasers of its lands must necessarily be limited to what appellants' dwindling ownership of lands produces and hence cannot tend to monopoly. Moreover, while International's salt machines preempted existing markets for salt, appellants' sales contracts and leases of its lands, instead of closing existing markets, have brought into production new land not theretofore worked, created new markets for transportation services and increased rather than restrained interstate commerce and trade. Northern Pacific's priority is only with respect to new business which it has developed—not with respect to business previously open to competitors—and it exists only when Northern Pacific

offers as favorable terms as any competitor. To say that this is the exclusion of competitors from a substantial market is palpably fallacious.

2. The Uniqueness of Land Does Not Warrant the Conclusion That Appellants Necessarily Have Market Dominance or Monopolistic Leverage By Virtue of Their Land Holdings.

We have been unable to find any cases dealing with land as a subject of monopolization. Some light is thrown on the subject, however, by the definition of "monopoly" given in the Restatement of the Law of Contracts, Sec. 515(d), as follows:

> "In the Restatement of this subject 'monopoly' means more than exclusive ownership of specific property or business. Every owner has in the broad sense of the word a monopoly of what he owns. In the Restatement of this Subject 'monopoly' is such ownership or control as dominates the means of production or the market in a business or occupation."

Basically, land is important from an economic standpoint simply as the means of production of commodities. In consequence, land ownership becomes monopolistic only when it dominates the means of production of a particular commodity in a particular market or locality. Thus, in *United States* v. *Reading Company*, 253 U. S. 26, ownership of the major portion of the anthracite coal bearing lands in the Schuylkill Region of Pennsylvania together with control of the railroads serving that field was found to be the means of obtaining a dominating control over the coal of the Schuylkill Field and over its transportation to market.

On the issue of market dominance or monopolistic leverage,

therefore, the "uniqueness" of land in respect of "its locality, character, vicinage, soil, easements or accommodations" is quite irrelevant, for it is the products rather than the land itself which are important. The products of one piece of land obviously do not differ from the like products of other land in the same locality. Thus the coal contained in one tract of land in a coal field does not differ from the coal contained in other tracts of land in the same field; the grass produced on one tract of grazing land does not differ from that on other tracts in the same area and the timber on a particular tract of timber land does not differ from the timber on another tract in the same area. Hence, in a tying arrangement with respect to land, the tying commodity is really not the land itself but the product for which the land is desired.

We cannot agree with the Government's contention that in *International Salt Co. v. United States*, 332 U. S. 392, it was the uniqueness of the patented article itself and not the patent monopoly that gave the Salt Company "monopolistic leverage" over users of the tied product. We think it clear that it was the right given by the patent to exclusively produce and lease the patented machines which furnished the monopolistic leverage, for this enabled the Salt Company to compel those desiring to use the patented machines to deal only with it and thereby compel their use of its salt. No matter how unique the machines might have been, if others had been free to manufacture and sell them the monopolistic leverage would have been wholly lacking. So, if in each locality where appellants' lands are located there are many more lands producing the same commodities, appellants' ownership cannot give them any monopolistic leverage or coercive power over producers or shippers of those commodities.

The references in the Government's brief to the testimony of lessees of appellants' grazing lands that appellants' lands, being interspersed with their other holdings, filled out their respective ranges and were for that reason important to them, does not demonstrate market dominance or monopolistic leverage, even in the case of grazing lands, to which this evidence alone relates. Appellants' checkerboard ownership is only one fact among many necessary to be considered. Among such other facts are: Whether appellants' grazing lands were leased first, or whether they were leased simultaneously with or after the lands with which they were interspersed were acquired; whether appellants were faced with the alternative of leasing the lands to the ranchers or letting them stand idle (because no one else would take them) or whether the ranchers were under the necessity of leasing them; and whether any of these lessees were financially able to purchase the leased lands and thus obtain them free of any traffic clause, had they so desired. No conclusion that appellants had any coercive power over their grazing lessees can properly be reached until these questions are answered.

Because a tying arrangement does not *necessarily* lessen competition substantially or exclude competitors from a substantial market or tend to monopoly in another line of commerce, *per se* illegality of such an arrangement under Section 1 of the Sherman Act depends upon a showing of market dominance over the "tying" product sufficient to coerce the patronage of those engaged in the business or occupation which provides the market for the tied product or service. Otherwise only voluntary contractual relations between buyer and seller, without *exclusion* of competitors from the market, can be presumed and neither substantial lessening of competition to the detriment of the public nor tendency to monopoly can be inferred. When it is remem-

bered that it is not land but the products of land that provide the market for transportation services, it becomes evident that ownership of insufficient lands to enable the owner to dominate the market for the products of his land must also be insufficient to coerce the patronage of those who are engaged in producing such commodities and who provide the market for their transportation. The products of one producer's lands are only a part of the market for transportation of such products and an exclusive right to transport the products of part of the lands in a producing area clearly does not *exclude* competitors from that transportation market nor does it necessarily affect competition to the detriment of the public or tend to monopoly.

There is no evidence in this case that appellants have by virtue of their land holdings any monopolistic leverage from which exclusion of competitors from any substantial market or substantial lessening of competition or tendency to monopoly could be inferred and there is nothing whatever to show that any harmful economic consequences have resulted from their use of traffic clauses. Summary judgment should not have been granted.

Respectfully submitted,

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